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February 7, 2000

Joe Williams, President
Gulf Coast Retailers Association
1300 Shepherd Drive
Houston, Texas 77007-3455

Dear Mr. Williams:

Thank you for your letter dated December 8, 1999, expressing concern about the administration of federal regulations by the Texas Department of Health's (TDH) Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). Although your letter touched on many facets of WIC vendor management practices, it appeared to focus attention on the Program's vendor integrity process and its use of covert compliance buys conducted in retail grocery stores contracted to provide WIC allowable foods.

As acknowledged in your letter, covert compliance buys are not a new technique being employed by the Texas WIC Program. In fact, the Texas WIC Program has successfully used compliance buys for many years. You were also correct in stating that the WIC Program is now relying more heavily on this vendor monitoring technique as opposed to in-store educational visits that were more heavily used in the past. The covert compliance buys now being conducted at selected retailers around the state are performed by state agency vendor monitors who pose as WIC clients and transact WIC food vouchers: The monitors purchase allowable WIC foods and brands and also select some that are not permitted on the program. They take the products selected to a checkout stand and document how the store handles the transaction. Obviously, the program's hope is that the store will sell the allowable products and tell the compliance monitor that some of the items selected cannot be purchased with WIC Program vouchers. Unfortunately, the program's experience over the past several months indicates that many stores are selling unallowable foods and brands at an alarmingly high rate. A number of store disqualifications have been levied as a result. Typical violations that yield a disqualification from the WIC program, ranging from one month to a year, include:

- Selling unallowable foods or brands of foods (e.g. selling **cereals** and juice drinks that do not meet the nutrient requirements of those authorized by the WIC Program). The sanction for this type of violation renders a one month disqualification.
- Charging the WIC Program more than the customary selling price (shelf price) for foods. This type of violation renders a one year disqualification.
- Charging WIC for foods not purchased when the monitor uses a multi-item food voucher. This type of violation renders a one year disqualification.

- Selling an infant formula other than the WIC contract brand (e.g. other than the formula type printed on the food voucher). This type of violation results in termination from the program with a minimum 6-month waiting period before re-application can be made.

You mentioned in your letter that the WIC Program makes “unannounced” compliance buys. You are correct. The program does not announce that it is coming to a store to do a buy. The program is trying to determine the standard business practice of a store. The assumption being that whether the store is found compliant or not, it likely represents **the** type of activity going on in the store during a typical business day. The WIC Program makes every effort to render the compliance buys fair and equitable. Every store targeted for compliance buys has three separate compliance buy passes conducted. The three passes never occur on the same day and the vendor monitor deliberately tries to utilize a different store checker during each pass. To distinguish between an error made by a single checker versus store practice (e.g. similar violations occurring during more than one transaction or by more than one checker), the WIC Program’s practice is to levy a sanction only when noted violations occur during more than one compliance buy pass. You mentioned that four of the major chain stores in the state have had member outlets disqualified for one month or more. Therefore, those stores were found to have committed program violations similar to those noted earlier during two or more compliance buy passes.

Please be advised that the United States Department of Agriculture (USDA), the federal agency overseeing the WIC Program, is prompting states to enhance their vendor management practices. The United States General Accounting Office (GAO) issued a report to Congress in August 1999 titled “Efforts to Control Fraud and Abuse in the WIC Program Can Be Strengthened.” That report cited needed improvements in WIC vendor management around the country to lessen program fraud and abuse. In turn, Congress included new mandates related to vendor management for USDA in the WIC program’s reauthorization bill, The William F. Goodling Child Nutrition Reauthorization Act of 1998, Public Law 105-336. In reaction, USDA has already finalized one set of vendor management regulatory provisions that all states must have operational by May 2000, and has a second set of vendor management regulations in proposed form. The later set, that pertains to vendor selection and vendor limiting criteria as well as mandatory vendor training, will likely be issued in final form in late federal FY 2000 or early FY 2001. **All** that said, you need to know that the emphasis being placed on vendor operations is not an anomaly. It is here to stay and will likely intensify in the future rather than decline.

Texas has touted itself as a leader in the area of vendor management for many years. The Program told itself, TDH management, and USDA that Texas did not have **the** level of vendor violations that many other states were encountering. However, recent compliance efforts in Texas using compliance buys indicates that we may have been laboring under a false set of assumptions. In any case, federal regulations require that the state monitor on-site at least ten percent of all contracted outlets each year. Our goals are to meet the ten percent requirement and to make each store review a meaningful test of practices.

In your letter, you touched on the State’s responsibility to provide **training** to WIC vendors. You are correct that the current WIC regulations contain a training component. **The regulations** do not require in-store training or mandatory **training** of all managers each contract period. Such provisions are included in the proposed federal rules. However, the Texas WIC Program currently offers training to all vendors. Training, as defined, is not limited to face-to-face or classroom instruction. Rather, training includes written material and visual aids provided to each vendor. Please be advised that Texas believes it meets the training requirement as follows:

- Each vendor account receives a very descriptive contract along with written policies and procedures. The account manager is required to initial adjacent to each policy number cited in the contract confirming that they have received, read, and agree to the policies.
- Each vendor account receives a WIC Vendor Training Manual.

- Each vendor account receives an ample supply of laminated color brochures showing pictures of WIC allowable foods. These are aids that checkers can keep with them at the checkout stand for ready reference.
- Each account is provided with a Cashier Training Video. Additional copies are readily available from the Program.
- WIC Program training staff periodically conduct WIC Vendor Training seminars. These training events occur in various locations around the state. All vendor outlets in the geographic area are sent a letter inviting them to send staff to these training seminars. Unfortunately, most vendors fail to send representatives.

The WIC Program readily acknowledges the **sizeable** task that grocers have in training their store personnel on proper food voucher acceptance practices. WIC is a complex program but it is driven by statutes formulated by Congress and further specified in rule by USDA. The state has no choice but to enforce program rules and WIC vendors, via their contracts, have agreed to abide by them as well. To lessen the burden on stores to train store clerks, especially if there is a 300% turnover in cashiers as you stated, we are recommending to all stores who have in store computer capability that they program the UPC codes for all allowable WIC products into a look-up table in their computer. Then when a cashier begins a WIC transaction, they could hit a register key to engage the lookup table. All food items scanned thereafter could be compared with the **UPCs** in the lookup table insulating the checker and the store from selling unauthorized WIC foods and brands.

Your letter stated that WIC retailers are not allowed a fair hearing process and that TDH violates its rules at Title 25 Texas Administrative Code Sections 1.51-1.55 when only TDH unilaterally determines which evidence can be utilized. You also stated that TDH has failed to allow due process of law and that retailers are entitled to timely notice of allegations. You are correct that retailers are entitled to due process of law through a fair hearing process. Due process requires a fair and impartial decision-maker, a timely notice of allegations, and an opportunity to be heard. **TDH's** process provides due process to WIC retailers in accordance with the TDH rules and WIC regulations found at Title 7 Code of Federal Regulations Section 246.18 relating to administrative appeal of state agency decisions.

The decision-maker in a WIC case is a TDH hearing examiner. Due process does not require that the decision-maker be a person who is not associated with the agency-party. It does require impartiality, which is provided by the hearing examiner. The hearing examiners are organizationally and physically separate from WIC staff and TDH Office of General Counsel staff (e.g., an attorney or legal assistant) who may present the case against the retailer. Testimony by and documentary evidence from both sides is allowed under Section 1.54 of the rules. The hearing examiner conducts the hearing and must consider the relevance of evidence offered by either party. Your letter does not cite any specific instances where evidence was offered but excluded by the hearing examiner.

The TDH rules at Section 1.52 also require timely notice of **the allegations** and of the retailer's opportunity to request a hearing. Once a hearing is requested, a notice of the hearing date is sent in accordance with Section 1.53(b). You cite no specific instances of untimely notice. The notice requirements in the rules comply with case law relating to due process requirements.

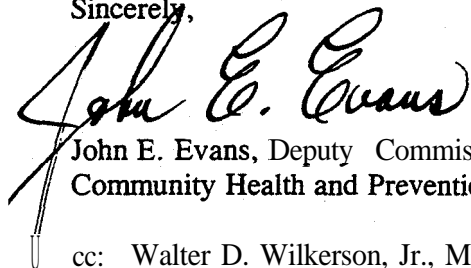
Finally, you indicated that the Texas WIC Program takes up to sixty days to pay grocers for their WIC claims submitted. This is incorrect. In the eleven months thus far in federal FY 1999, which began October 1, 1998, the program has an overall average monthly turnaround related to paying vendor claims of 11 days. This ranged from a high of fifteen days in January 1999 to a low of seven days in July 1999. This turnaround time is calculated from the time that claims are received at TDH to the time a direct deposit is transmitted by the State Comptroller to the vendor's bank. Most vendors are submitting claims at least weekly while many chain outlets submit claims daily.

The Texas WIC Program processes over \$30 million per month in vendor claims representing about 20,000 individual claims supported by approximately 1.7 million food vouchers. I believe we are turning claims around in a timely manner and are well within the state's recent legislation establishing a 30 day prompt payment period.

Your letter ended with a formal request for a meeting with state staff responsible for WIC training and compliance that would include representatives from WIC retailers. We are very interested in working with you and retailer representatives to devise methods that ensure the integrity of the WIC Program and make the process as easy as possible for retailers to implement. As discussed during your recent visit, we will be available at a time and place that you will arrange to discuss the issues and seek solutions that meet the needs of WIC, its clients, and the retailers. Please be advised that I plan to invite representatives from the USDA Southwest Regional Office to join in those discussions.

Should you have additional comments or questions, please contact Mr. Gerald Cannaday, Acting Chief, Bureau of Nutrition Services at (512) 458-7444.

Sincerely,

A handwritten signature in black ink, reading "John E. Evans". The signature is written in a cursive style with a large, stylized "J" and "E".

John E. Evans, Deputy Commissioner
Community Health and Prevention

cc: Walter D. Wilkerson, Jr., M.D., Chair, Texas Board of Health
Senator Jane Nelson, Chair, Health Services
Representative Patricia Gray, Chair, Public Health
Representative Garnet Coleman, District 147
Representative Rick Noriega, District 145